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No. 85-2154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE ARMSTRONG RUBBER COMPANY and COOPER TIRE & RUBBER COMPANY,

Petitioners,

v.

THE UNITED STATES, Et Al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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There can be no question but that the Court of Appeals for the Federal Circuit ("CAFC") has a different view of what constitutes a motion to alter or amend a judgment for purposes of Fed. R. App. P. 4(a)(4) than does the Fifth Circuit. That difference in view is not without consequence. The CAFC hears appeals from, *inter alia,* the United States district courts and the Court of International Trade ("CIT").

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* The information required by Rule 28.1 appears in the petition for certiorari at 1 n.1.

28 U.S.C. § 1295. As conceded by the Government (Opp. at 3 n.3), the CAFC obviously does not differentiate between Fed. R. Civ. P. 59(e) (governing post-judgment district court practice) and the identical operative language of CIT R. 59(e) (governing post-judgment CIT practice). The clear and explicit construction of that language articulated by the Fifth Circuit has simply been rejected by the CAFC and the Government is wrong in its refusal to acknowledge the mischief that will flow from a failure to resolve the conflict.

The Government is also wrong to dismiss the CIT as some "specialized" tribunal whose pronouncements do not have an impact on the main body of federal practice and jurisprudence. The court was established in 1980, as a "generalist" court under Article III of the Constitution, with all the powers in law and equity possessed by, or conferred by statute upon, a United States district court.[1] Since its beginning, the CIT promulgated rules which were "styled, numbered and arranged to the maximum extent practicable in conformity with the Federal Rules of Civil Procedure." Preface to CIT Rules.[2]

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[1] *See, e.g.,* the remarks of the CIT's distinguished Chief Judge, Hon. Edward D. Re, delivered at that court's first annual judicial conference, on February 15, 1984:

> The Customs Courts Act of 1980 reaffirmed and perfected the Article III status of the court. By virtue of that legislation, the court is now a generalist court, engrafting the broad principles of administrative law and equity onto the field of international trade law.

102 F.R.D. 639, 645 (1984). *See also* 28 U.S.C. § 1585; *H.R. Rep. No. 1235,* 96th Cong., 2d Sess. 18-20 (1980).

[2] *See also* Report of the Committee on Rules and Practice,

That CIT R. 59(e) was modeled after Fed. R. Civ. P. 59(e) cannot be gainsaid. Further, as noted by the Government, this year the CIT has taken steps to conform its Rule 60(b) to Fed. R. Civ. P. 60(b).[3] In commenting on the proposed amendment (adopted by the court without change), the CIT's Committee on Rules and Practice explained that the amendment eliminates an anomaly and "contrasts the effect of filing a Rule 60(b) motion with that of a Rule 59 motion and avoids potential confusion in the application of Federal Rule of Appellate Procedure 4(a)(4)." App. M, *infra*, 57a-59a at 58a. However, contrary to the Government's suggestion, the fact that the CIT has corrected its Rule 60(b) does not detract from, or in any way resolve, the current conflict. Indeed, both the CAFC and the CIT have correctly recognized that motions filed under Rule 59(e) (whether of the Federal or the CIT Rules) affect the appealability of decisions under Fed. R. App. P. 4(a)(4). The conflict created by the CAFC's aberrant application of Fed. R. App. P. 4(a)(4) to CIT R. 59(e), which has not been altered in any way, will continue unabated.

As for the conflict between the CAFC's decision below and the law as articulated by this Court (*see*

United States Court of International Trade at 5 (September 5, 1984) ("Most of the proposed amendments are intended to conform the USCIT Rules to the Federal Rules of Civil Procedure to the maximum extent practicable. Additions, deletions and modifications to and from the Federal Rules have been made when required. Accordingly, assistance in the interpretation of the USCIT Rules may be available from the Notes of the Advisory Committee on Rules which accompany the Federal Rules, where appropriate; this Report; and case law.").

[3] The new amendments to CIT R. 60(b) are set forth in App. L, *infra*, 55a-56a.

Pet. at 7 n.9), the Government has no defense but to misdescribe the relief petitioners sought in their motion to alter the judgment. *Compare* motion (App. I, 44a-48a) *with* Government's brief in opposition (at 2-3). Moreover, the Government appears to have finally conceded that the CIT was wrong to characterize our post-judgment motion as a Rule 60 motion. Opp. at 11 n.16. (*See* Opp. App.) Since the CIT had simply adopted the Government's proposed order, the Government has now implicitly acknowledged its fault in leading the CIT into error.

In brief, the petition for certiorari should be granted and, indeed, the decision below should be summarily reversed.

Respectfully submitted,

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APPENDIX L

UNITED STATES COURT OF INTERNATIONAL TRADE

Amendments to Rule 60

Rule 60 is amended as follows:

Rule 60. Relief From Judgment or Order

(a) *Clerical Mistakes.* • • •

(b) *Mistakes, Inadvertence, Excusable Neglect--Newly Discovered Evidence--Fraud, Etc.* On motion of a party or upon its own initiative and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. ~~[A motion of a party shall be served and filed not later than 30 days after the judgment, order, or proceeding was entered or taken. The court, upon its own initiative, may also grant relief from a judgment or order as prescribed by this rule not later than 30 days after the date of entry of the judgment or order.]~~ **The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.**

This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended, eff. Jan. 1, 1985; July 21, 1986, eff. Oct. 1, 1986.)

APPENDIX M

REPORT OF THE COMMITTEE ON RULES AND PRACTICE

UNITED STATES COURT OF INTERNATIONAL TRADE

[SUBMITTED TO THE COURT WITH PROPOSED AMENDMENTS TO THE RULES WHICH WERE APPROVED WITHOUT MODIFICATION ON JULY 21, 1986]

Attached hereto is the final draft of the proposed amendments to Rules 3, 4, 47, 48, 60, 62, and 75 of this court. Deleted portions of present rules are enclosed in brackets and overstricken with dashes. Added language is printed in boldface type. Various unchanged sub-provisions have been omitted.

The Committee on Rules and Practice solicited comment from interested members of the bar on the original draft of the proposed amendments. The submitted responses prompted certain revisions to the proposed amendments which are reflected in the final draft.

The following comments are offered by the Committee in connection with the final draft of the proposed amendments. If the proposed amendments are adopted by the judges of this court, these comments would not be published but would be made publicly available in the clerk's office.

. . . .

RULE 60

The proposed amendment to Rule 60 eliminates the present 30-day time limit for filing a Rule 60(b) motion, and substitutes the time limits set forth in Rule 60(b) of the Federal Rules of Civil Procedure. It appears that the 30-day time limit specified in 28 U.S.C. § 2646 for bringing a motion for "new trial or rehearing" was not intended

to apply to Rule 60 motions for "relief from a judgment or order", but was only intended to apply to Rule 59 motions. This amendment eliminates the anomaly apparent in present Rule 60(b)(2), and brings Rule 60(b) more closely in line with the structure and purpose of its correlate in the Federal Rules of Civil Procedure. By specifying that a Rule 60(b) motion "does not affect the finality of the judgment or suspend its operation", the amendment contrasts the effect of filing a Rule 60(b) motion with that of a Rule 59 motion and avoids potential confusion in the application of Federal Rule of Appellate Procedure 4(a)(4).

It has been suggested that the proposed amendment to Rule 60(b) conflicts with the following prior decisions, each of which held that a motion to vacate a judgment of dismissal filed more than 30 days after entry of the judgment was untimely: *Belwith International, Ltd. v. United States,* 2 CIT 14 (1981); *United States v. Torch Manufacturing Co., Inc.,* 509 F.2d 1187, 62 C.C.P.A. 41 (1975); and *R.W. Smith & Co., Inc. v. United States,* 415 F. Supp. 895, 76 Cust. Ct. 253 (1976).

Although the *Belwith* decision cites 28 U.S.C. § 2646 as one of the grounds for its holding, it is clearly sufficient that the motion in question was untimely under the terms of CIT Rule 60(b). The *Torch* and *Smith* decisions, unlike *Belwith,* were decided prior to the enactment of the Customs Courts Act of 1980. Those decisions held that the 30-day limit on motions for "retrial" or "rehearing" under former-28 U.S.C. § 2639 (the predecessor to 28 U.S.C. § 2646), also applies to motions to vacate a judgment. The decisions emphasized that regardless of how the motion was designated, the relief sought was the same. At the time, however, this court (the Customs Court) was not imbued with the full equitable powers it possesses today. *See* 28 U.S.C. §§ 1585, 2643(c)(1). Hence, the sort of relief contemplated under Rule 60(b) of the Federal Rules of Civil Procedure (after which CIT Rule 60(b) is patterned),

which is essentially equitable in nature, was beyond the scope of the court's authority.

Under the court's present jurisdiction, which includes full equitable powers, a meaningful distinction can be drawn between the relief sought in a Rule 59 motion and that contemplated in motions under proposed amended-Rule 60(b). Because 28 U.S.C. § 2646 was enacted as part of the Customs Courts Act of 1980, its terms should be construed *in pari materia* with the other relevant provisions of that Act. It seems clear that Congress intended the terms "motion . . . [for] retrial or rehearing" in § 2646 to refer to a Rule 59-type motion, not only because those terms correspond to the terms used in Rule 59(a) of the Federal Rules of Civil Procedure, but also because under 28 U.S.C. § 2645(c), a § 2646 motion for retrial or rehearing suspends the finality of the court's decision. On the other hand, a Rule 60(b) motion under the proposed amendment would not affect the finality of the court's prior judgment. Such a motion thus does not appear to be the sort of motion contemplated by 28 U.S.C. § 2646. Rather, the court's jurisdiction and authority for entertaining a Rule 60(b) motion would flow from Congress' grant of full equitable powers to this court in 28 U.S.C. § 1585 ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."). *See also* 28 U.S.C. § 2643(c)(1). Accordingly, the cited cases do not appear to pose an impediment to the proposed amendment to Rule 60.

. . . .